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6 Attorneys for Defendant
7 Couture International, Inc.

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10 WMCV PHASE 3, LLC, a Delaware limited
liability company,

11 Plaintiff,

12 vs.

13 SHUSHOK & MCCOY, INC., a Texas
14 corporation; MATTHEW J. TRAVIS, an
individual; MATT TURNER, an individual;
15 RICHARD BIRDWELL, an individual;
16 GLOBAL ACCENTS, INC., a California
corporation; COUTURE INTERNATIONAL
17 INC., a Quebec corporation; DOES I through
X, inclusive; ROE ENTITIES I through X,
inclusive,

18 Defendants.

CASE NO. 2:10-cv-00661-GMN-RJJ

COUTURE INTERNATIONAL INC.'S
TRIAL BRIEF

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20 Defendant, COUTURE INTERNATIONAL INC. ("Couture"), by and through its
21 counsel Jolley Urga Wirth Woodbury & Standish, hereby submits this Trial Brief in accordance
22 with the Pretrial Order (ECF 141).

23 I.

24 INTRODUCTION AND FACTUAL BACKGROUND

25 This is an action by WMCV PHASE 3, LLC, ("Phase 3") against two tenants – Couture
26 and Global Accents, Inc. ("Global") -- in the World Market Center for the alleged breaches of
27 their respective leases. Phase 3 also sued Shushok & McCoy, Inc. ("Shushok") and its owners
28

1 for various claims for relief arising out of a contract between Shushok and Phase 3 whereby
2 Shushok acted as Phase 3's commercial collection agent.

3 In May 2007, Couture entered into a Lease Agreement with Phase 3 for the lease of
4 approximately 3,555 sq. ft. of space in World Market Center located at 455 S. Grand Central
5 Parkway, Las Vegas, NV. The lease was to commence on the first day of the calendar month
6 when the building was open or the date the tenant first opened its business in the premises.
7 Shortly after the lease term commenced (July 1, 2008), disputes arose between Couture and
8 Phase 3. By the end of December 2008, Couture was removed from the premises. As of
9 December 2008, Couture was indebted to Phase 3 for approximately \$41,000.00.

10 Phase 3 retained the services of Shushok in or about 2007 as its commercial collection
11 agent to recover past due amounts of rent from Couture and other tenants. Indeed, at the time
12 Shushok began seeking to collect amounts owed by Couture, Shushok had the actual authority
13 to collect past due amounts on behalf of Phase 3. Unbeknownst to Couture, however, was that
14 Phase 3 terminated Shushok's authority in June 2009. Nonetheless, following this termination,
15 Shushok continued to seek to collect from Couture amounts owed to Phase 3. To that end, on
16 July 28, 2009, Couture signed a Lease Termination and Release Agreement whereby Couture
17 was released from liability under its lease with Phase 3 in exchange for the payment of \$20,000.

18 Phase 3 claims that because Shushok had no actual authority to act on its behalf after
19 June 2009, the Lease Termination and Release Agreement had no effect on Couture's liability to
20 Phase 3. Phase 3 further claims that it did not receive any portion of the \$20,000 Couture paid
21 to Shushok.

22 As will be shown below and at trial, however, Shushok had the apparent authority to act
23 on Phase 3's behalf and, therefore, the Lease Termination and Release Agreement must be
24 enforced as between Phase 3 and Couture. Of course, this does not leave Phase 3 without a
25 remedy because it can recover against its agent, Shushok, for any damages caused as a result of
26 any actions allegedly taken beyond the scope of its authority.

II.

**SHUSHOK HAD APPARENT AUTHORITY TO ENTER INTO
THE LEASE TERMINATION AND RELEASE AGREEMENT.**

It is undisputed that at the time Shushok began its collection efforts with Couture regarding the debt owed to Phase 3, Shushok had the actual authority to act on Phase 3's behalf. It is also undisputed that neither Phase 3 nor Shushok ever informed Couture that Shushok's authority to act on behalf of Phase 3 was revoked. Therefore, the core issue to be determined at trial is whether Shushok had apparent authority to act on behalf of Phase 3.

"Apparent authority is 'that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence.'" *Dixon v. Thatcher*, 103 Nev. 417, 742 P.2d 1029, 1031 (1987). In order to prove apparent authority, a party must prove that: (1) it subjectively believed that the agent had authority to act for the principal, and (2) the subjective belief in the agent's authority was objectively reasonable. *Great American Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 353, 934 P.2d 257, 261 (1997).

In this case, Phase 3 claims that Shushok had no authority to act on Phase 3's behalf in settling the debt with Couture in July 2009 because Phase 3 terminated Shushok's authority in June 2009. In other words, Phase 3 merely claims that Shushok did not have *actual* authority. Further, Phase 3 claims that Shushok never had the authority to enter into agreements on its behalf, but that Shushok only had the authority to act as a collection agent. It is undisputed that Couture was never informed that Shushok's authority had been terminated or of the limits of Shushok's authority.

The evidence at trial will show that Couture subjectively believed that Shushok had the authority to act for Phase 3. Indeed, Phase 3 admits that Shushok was granted such actual authority at least through June 2009. The issue here is whether Couture's subjective belief in July 2009 that Shushok had authority to settle the debt was objectively reasonable. Couture's belief was objectively reasonable because Phase 3: (1) knew that Shushok was seeking to collect the debt from Couture; (2) never informed Couture that Shushok's authority to act had been

1 revoked; and (3) because apparent authority is defined as that which a principal permits the
2 agent to represent himself as possessing, and Phase 3 never did anything to prevent Shushok
3 from continuing to represent itself as Phase 3's agent.

4 Further, despite Phase 3's claims to the contrary, Shushok had authority to enter into
5 agreements Phase 3's behalf. It has long been the law in Nevada that "[a] principal [] may be
6 bound by the acts of its agent as to third parties who have no reason to know of the agent's
7 improper conduct. This is so even when the agent acts for his own motives and without benefit
8 to his principal." *Homes Savings Ass'n v. General Electric Credit Corp.*, 101 Nev. 595, 600,
9 708 P.2d 280, 283 (1985). Here, according to Phase 3, Shushok was authorized to recover any
10 past due amounts from Couture. At no time did Phase 3 express to Couture that there were any
11 limits to the authority given to its agent. Thus, when Shushok represented that it had the
12 authority to settle Couture's debt, there was no reason to believe that Shushok lacked that
13 authority. To the extent Shushok's conduct was improper, Couture had no reason to know it.

14 In sum, Phase 3 hired an agent that, according to Phase 3, went rogue and acted beyond
15 the scope of its actual authority, but within the scope of its apparent authority. The controlling
16 law protects third parties such as Couture and attributes the risk of loss to the principal – Phase
17 3.

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III.

CONCLUSION

After being evicted from the premises and pursued by Shushok, Phase 3's authorized collection agent for amounts owed, Couture finally entered an agreement in which it paid \$20,000 in exchange for being released from all liability with respect to the lease. Only after doing so, however, did Phase 3 finally inform Couture that Shushok did not, in fact, have the authority to act on its behalf. Phase 3 went even further and said that the \$20,000 Couture paid would not reduce the debt owed to Phase 3, that the release of liability did not bind Phase 3, and that Phase 3 would then file this lawsuit to collect hundreds of thousands of dollars in claimed rent. This conduct is not only unjust, but is also legally untenable given Shushok's apparent authority. Accordingly, judgment should be entered in favor of Couture on all of Phase 3's claims against it.

Dated this 8th day of November, 2012.

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